Supreme Court, U.S.
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No. 00-423

IN THE

Supreme Court of the United States

DAVID KEITH POGUE and DENISE POGUE,

Petitioners,

v.

OGLETHORPE POWER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eleventh Circuit erred in holding that the District Court did not abuse its discretion by allowing expert testimony on Respondent's affirmative defense of contributory negligence where the expert's testimony was based on a reliable foundation, was relevant, and the court performed the required gatekeeping function?

2. Whether the Court of Appeals for the Eleventh Circuit erred in holding that the District Court did not abuse its discretion by refusing to admit evidence of a wrap-up insurance policy?

CORPORATE DISCLOSURE STATEMENT

Oglethorpe Power Corporation is a non-profit corporation which is equally owned by thirty-nine cooperatives. There is no parent and no publicly held company owns 10% or more of the stock of the Respondent.

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STATEMENT OF THE CASE

Respondent Oglethorpe Power Corporation accepts the facts as outlined by Petitioners, with the following additions:

Prior to the commencement of trial, the parties engaged in rigorous written and oral argument before the court on the issues of admissibility of Petitioner David Pogue's drug screen results and the introduction of the wrap-up insurance policy. Tr. at 30-37. After consideration of the arguments presented, the Court allowed evidence of David Pogue's impairment on the issue of contributory negligence and excluded the admission of the wrap-up insurance policy. Tr. at 30-37, 867, 902-903. The United States Court of Appeals for the Eleventh Circuit found that the district court did not abuse its discretion by refusing to admit the wrap-up insurance policy into evidence and did not abuse its discretion in admitting the positive drug screen results. Pet., App. A at 9a.

The issues presented to the Eleventh Circuit and those before this Honorable Court both involve an abuse of discretion standard. Petitioners have repeatedly ignored this liberal standard. Instead, Petitioners misstate the facts, expressing that neither the Eleventh Circuit nor the District Court made any inquiry whatsoever as to the drug screen results and the insurance policy. The Eleventh Circuit's ruling was proper in all respects. Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE RECORD AND THE DECISION BELOW CLEARLY SHOW THAT THE EXPERT'S TESTIMONY WAS BASED ON A RELIABLE FOUNDATION AND WAS RELEVANT, THE COURT PERFORMED THE REQUIRED GATEKEEPING FUNCTION, AND THE ELEVENTH CIRCUIT DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S RULING.

The decision whether to admit evidence of consumption or use of potentially intoxicating drugs and beverages is a matter which is dedicated to the sound discretion of the trial court. Fed. R. Evid. 403, 702, 104; *Ballou v. Henry Studios*, 656 F.2d 1147 (5th Cir. 1981). The same is true of any review of the court's decision under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). The Petitioners did not demonstrate to the Eleventh Circuit that the district judge abused his discretion in admitting this evidence.

The Eleventh Circuit thoroughly explained the relevance and admissibility of Mr. Pogue's positive drug screen results. The Eleventh Circuit stated that

> [e]vidence of impairment — the drug screen results — is relevant where contributory negligence is one of the ultimate questions before the jury. While the results did not require the jury to find that Pogue was impaired at the time of his fall, the positive drug screen was some evidence from which the jury would have been entitled to infer that he was. Additionally, the [Petitioners] were entitled to cross-examine and establish, as they did, that there are many reasons *not* to draw

> such an inference. The issue is then left to the judgment of the jury on the facts of this case. That is how we do it, and that is how it was done in this case.

Pet., App. A at 6a-7a (emphasis original).

Daubert provides a two part test for determining whether to admit expert testimony. 509 U.S. at 580. First, the trial judge must ensure that the expert's testimony rests on a reliable foundation. *Id.* Second, the trial judge must ensure that the expert's testimony is relevant. *Id.* This Court explained that the first inquiry is flexible and that its focus should not be "on the conclusions that they generate." *Id.* Further, "cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion . . . is the appropriate means by which evidence based on valid principles may be challenged." *Id.*

Next, the expert's testimony must be relevant. *Id.* The testimony regarding the drug screen results assisted the jury both in understanding the evidence and in determining a fact in issue. The Eleventh Circuit clearly explained the relevance of the results from the drug screen in this case and the method of dealing with such evidence. Pet., App. A at 6a-7a.

In *Kumho Tire Company, Ltd., et al. v. Carmichael, etc. et al.*, this Court further explained the necessary inquiries where expert testimony is involved. 526 U.S. 137, 119 S. Ct. 1167 (1998). In *Kumho*, this Court stated that under *Daubert*, the Rule 702 inquiry is flexible and the *Daubert* factors are not conclusive. 526 U.S. 137, 138. Moreover,

"whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude." *Id.* at 139. An expert's testimony is given "latitude unavailable to other witnesses on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* at 138. Finally, as was done by the Eleventh Circuit in this case, an abuse of discretion standard is applied on the review of a trial court's determination of whether to admit expert testimony. *Id.* at 138-139.

A. The expert's testimony was relevant and based on a reliable foundation.

Petitioner David Pogue tested positive for marijuana in a drug screen performed at Floyd Medical Center where he was taken immediately after he fell through the opening in the floor. The drug screen showed that Pogue had at least 25 nanograms per milliliter of THC in his body at the time of the test. Tr. at 911. THC is the active ingredient in marijuana. Tr. at 944. Respondent alleged contributory negligence as an affirmative defense. Tr. at 19-21. Petitioners defended by alleging that Petitioner David Pogue tested positive for THC due to "passive inhalation." Tr. at 411-412.

Respondent offered expert testimony from Dr. Horton McCurdy, a forensic pathologist with the Georgia State Crime Lab. Tr. at 939. Dr. McCurdy was retained by Respondent through his private consulting firm, Toxicology Consultants, Incorporated. Tr. at 939. Dr. McCurdy testified that the level of THC Mr. Pogue tested positive for is not consistent with "passive inhalation." Tr. at 945-947. Further, Dr. McCurdy explained that to reach

that level of THC by passive smoke alone, the following conditions would have to be satisfied: Mr. Pogue must have spent at least one hour in an automobile with two marijuana smokers, each constantly smoking a marijuana cigarette, with the windows shut and no air conditioning could be in use. Tr. at 946-947. Moreover, the sample must have been collected within six hours of exposure. Tr. at 947. If these severe conditions were met, Dr. McCurdy testified that only one in twenty-four persons would test positive for THC. Tr. at 946. Dr. McCurdy testified that his testimony was based not only on his personal experience as a forensic toxicologist for more than twenty five years, but also on scientific studies which have been reported in scientific literature. Tr. at 939, 946-948.

Accordingly, Dr. McCurdy's testimony regarding the drug screen was based on a reliable foundation and the positive test was relevant to the issue of contributory negligence and Mr. Pogue's drug use on the day of his fall.

B. The District Court performed its gatekeeping function.

The Petitioners argue that the district court abdicated its gatekeeper responsibilities under *Daubert* by allegedly refusing to hold a hearing. It is clear, however, that the court did in fact hold a hearing on July 15, 1998, on the Petitioners' motion and made a preliminary determination on the basis of Federal Rule of Evidence 104(a). Tr. at 30-38. It is unclear whether Petitioners believe that this should have been a full evidentiary hearing or are otherwise dissatisfied. It is irrelevant whether their contention is that an evidentiary hearing should have been held, because Federal Rule of Evidence 104(a) does not require an evidentiary hearing.

In fact, the rule specifically states that the court's "determination is not bound by the rules of evidence except those with respect to privileges." Accordingly, the trial court did not abdicate its responsibility as insisted by the Petitioners.

C. The Eleventh Circuit Court of Appeals did not err in affirming the district court's ruling.

The essence of Petitioners' argument before this Honorable Court is that the evidence should have been excluded under *Daubert*; however, Petitioners cannot show that the trial judge's decision was an abuse of discretion. The Eleventh Circuit has held that while decisions whether to apply *Daubert* are de novo, a court's "decision to exclude particular evidence under *Daubert* [will be reviewed only] for abuse of discretion." *Carmichael v. Samyang*, 131 F.3d 1433 (11th Cir. 1997), (citing *General Electric v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997)). No abuse of this kind can be shown. Therefore, the Petition for a Writ of Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE THE ELEVENTH CIRCUIT DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S RULING REFUSING TO ADMIT EVIDENCE OF A WRAP-UP INSURANCE POLICY, AND THE UNPUBLISHED OPINION OF THE ELEVENTH CIRCUIT DOES NOT DENY PETITIONERS THE BENEFIT OF THE RULE OF LAW, BECAUSE THE COURT'S RULING WAS BASED UPON SOUND LAW AND DOES NOT ATTEMPT TO AVOID PRECEDENTIAL EFFECT.

A. The Eleventh Circuit did not err in affirming the trial court's ruling refusing to admit evidence of a wrap-up insurance policy.

The trial court's determination to exclude the wrap-up insurance policy was within its sound discretion. The Eleventh Circuit did not err in affirming the trial court's decision. Further, the trial court did not exclude this evidence solely because it was an insurance policy. The trial court made this fact perfectly clear the last time the documents were tendered:

> . . . I'll reiterate what I said the other day. Those two documents ya'll showed me that I would not let in evidence, I've seen nothing that makes them admissible. They're not admissible just because there's some fellow's written a book about wrap-up policies. It's rank hearsay insofar as admissibility's concerned.

Tr. at 867.

Evidence of this wrap-up insurance policy was also inadmissible under Federal Rule of Evidence 411, which states that "evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully." Such evidence is admissible only where it is "offered for another purpose, such as proof of agency, ownership or control or bias or prejudice of a witness." Fed. R. Evid. 411. As the Eleventh Circuit explained, "[t]he district court excluded this evidence because it did not prove any matter of consequence in the action because Oglethorpe did not deny that it exercised control over the site." Pet., App. A at 3a. When this evidence is offered for some other purpose, it may be admitted only after a Federal Rule of Evidence 403 balancing process. The trial court conducted such a balancing test and thoroughly explained its reasons. Tr. at 30-37, 736, 867. It did so both when initially denying the Petitioners' motion in limine regarding the wrap-up policy and during the course of the trial when the request was renewed. Pet., App. B at 10a-11a; Tr. at 736, 867.

The Eleventh Circuit stated that it was entirely admissible for Petitioners to introduce facts which showed that Respondent "did things to guarantee safety or assumed responsibility for guaranteeing safety at the site. . . . Indeed, the [Petitioners] introduced substantial evidence on the issue of control, including that [Respondent] hired safety inspectors and that these inspectors direct contractors to do things to conform to [Respondent's] safety requirements." Pet., App. A at 5a. Moreover, the Eleventh Circuit explained that

> introduction of the wrap-up policy was not essential, if helpful at all, to proving that

> [Respondent] undertook, if indeed it did, to guarantee safety at the construction site. . . . [W]e agree with the district judge that the introduction of the wrap-up policy would have "put [ ] insurance all over this case," and "the prejudicial effect far outweighs its relevance."

Pet., App. A at 5a-6a.

The trial court followed the mandates of Federal Rules of Evidence 411 and 403 and appropriately engaged in a balancing test. The decision of the trial court was not an abuse of discretion. Accordingly, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

B. The unpublished opinion of the Eleventh Circuit does not deny Petitioners the benefit of the rule of law, because the court's ruling was based upon sound law and does not attempt to avoid precedential effect.

The unpublished opinion did not deny Petitioners the benefit of the rule of law, because the court's rule in this case was based upon sound law and did not attempt to avoid precedential effect. Petitioners attempt to persuade this Court that the Eleventh Circuit did not publish its opinion, because it did not want to "acknowledg[e] the error of its ruling" and avoid the precedential effect of its ruling. Pet. at 16. Petitioners' accusation is without merit.

Petitioners' entire appeal seeks review based upon the common abuse of discretion standard. Petitioners support their zealous argument on the importance of precedential rulings by citing solely to *Anastasoff v. United States of America*, which, interestingly, as an Eighth Circuit case has

only persuasive and not precedential value to the Eleventh Circuit. No. 99-3917EM, (August 22, 2000), 2000 U.S. App., LEXIS 21179. Nevertheless, Respondents do not maintain that *Anastasoff* is an erroneous holding, but that it simply is inapplicable to the facts of this case.

The wrap-up insurance policy was not admitted, as both the trial court and the Eleventh Circuit thoroughly explained, for several reasons. First, Petitioners claim that the wrap-up policy was essential to prove Respondent's motive to control safety on the job site. Pet. at 11-13. However, the Eleventh Circuit explained that "[Respondent] did not deny that it exercised control over the site." Pet., App. A at 3a. Ergo, the wrap-up policy was not essential to Petitioners' case. Second, under the Fed. R. Evid. 403 balancing process, it was held that admitting this insurance policy " 'would have 'put[ ] insurance all over this case,' and 'the prejudicial effect far outweighs its relevance.' " Pet., App. A at 5a-6a. Accordingly, the insurance policy was not admitted. Finally, the trial court ruled that the wrap-up insurance policy was "rank hearsay" and was thus inadmissible. Tr. at 867.

The Eleventh Circuit neither erred in its ruling nor attempted to avoid an erroneous ruling by ordering the case be unpublished. The unpublished opinion of the Eleventh Circuit does not suggest that it is somehow a secret attempt to hide a bad rule; that implication by Petitioners is meritless. Petitioners misrepresent the facts of this action and cite to inapplicable case law to suggest that both the trial court and the Eleventh Circuit disregarded the rules of evidence and manufactured an unpublished opinion to avoid "acknowledging the error of its ruling." Pet. at 16. Petitioners' assertion is clearly incorrect. Consequently, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

The issues presented in this case involve whether the Eleventh Circuit, in affirming the jury's verdict, erred in holding that the district judge did not abuse his discretion in admitting the results of a positive drug screen and refusing to admit the wrap-up insurance policy into evidence. The district court and the Eleventh Circuit Court of Appeals clearly followed *Daubert*, *Kumho Tire*, and the Federal Rules of Evidence. Evidence of the unpublished opinion is insignificant to issues before this Court.

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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